



Lavington Security Guards Limited v Omambia (Employment and Labour Relations Appeal E019 of 2023) [2023] KEELRC 1814 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1814 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E019 OF 2023**

CN BAARI, J

JULY 27, 2023

BETWEEN

LAVINGTON SECURITY GUARDS LIMITED APPELLANT

AND

JEREMIAH MOSETI OMAMBIA RESPONDENT

RULING

1. Before Court is the Appellant/Applicant's Motion dated April 11, 2023, brought pursuant to Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and Article 159(2)((a), (b) and (c) of the Constitution. The Applicant seeks orders THAT: -
 - i. Spent.
 - ii. Spent.
 - iii. The Honourable Court be pleased to grant an order of stay of execution of the Judgment of Hon Robert Mobisa Oanda delivered on March 16, 2023, at Winam Law Courts, Employment and Labour Relations Court Case No E010/2022 and/or any consequential orders thereto upon terms as may be just and reasonable and facilitate this appeal.
 - iv. The Costs of this application be provided for.
2. The application is supported by grounds on the face of the motion and the affidavit of Roy Kiprotich, sworn on April 12, 2023. The Applicant/Appellant argues that it is aggrieved by the decision rendered by the Magistrates Court on March 16, 2023, and for which it has preferred an appeal before this court.
3. The Appellant further avers that the appeal has high chances of success and that it is likely to suffer substantial and irreparable loss, unless the Respondent is restrained in the meantime from executing the judgment/decreed in the matter.



4. It is the Applicant's aversion that its appeal will be rendered nugatory if the orders sought are not granted.
5. The Respondent opposed the motion vide a replying affidavit sworn on April 17, 2023. The Respondent avers that the application is an afterthought and is only tailored to frustrate him and abuse the process of the Court.
6. The Respondent further avers that granting of the orders sought will deny him the fruits of his judgment, and that the Applicant has not proved that his appeal will be rendered nugatory as by law required and should be dismissed.
7. The Respondent avers that the Applicant has not proved the nature and extent of the substantial loss it would suffer if the orders are not granted.
8. Parties canvassed the application through written submissions, and which have been duly considered.

Determination

9. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, provides for stay of execution in the following words:
 - ' (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (2) No order for stay of execution shall be made under sub-rule (1) unless—
 - (a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.'
10. The general rule in an application for stay is that if there is no overwhelming hindrance, a stay of execution ought to be granted so that an appeal, if successful, may not be rendered nugatory.
11. Cotton L.J in *Wilson v Church (No 2) 12 Ch D (1879) 454* held:
 - ' I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.'



12. In exercise of its discretion in an application for stay orders, the Court is guided by the grounds set out in the case of *Stephen Wanjohi v Central Glass Industries Ltd Nbi HCCC No 6726 of 1991* where the Court emphasized that:

' For the Court to grant stay of execution there must be:

- (a) Sufficient cause
- (b) Substantial loss
- (c) No unreasonable delay and security offered for due performance of the decree.'

13. The Appellant/Applicant's case is that it stands to suffer substantial and irreparable loss if the orders sought are not granted. The award made by the Trial Court in favour of the Respondent is about Kshs 400,000. The issue is whether this figure is substantial as to occasion the Appellant/Applicant loss if its appeal succeeds.

14. In my view, a figure of Kshs 400,000 is not loose cash and especially when the Respondent has not demonstrated his ability to refund the decretal sum should the Appellant's appeal succeed.

15. In *Century Oil Trading Company Ltd vs Kenya Shell Limited Nairobi (Milimani) HCMCA No 1561 of 2007*, the court stated: -

' The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.'

16. The appellant/Applicant's motion was filed on April 13, 2023, while the judgment subject thereof, was rendered on March 16, 2023, just about a month thereafter. One month in my view is not inordinate delay.

17. It is also not disputed that the Applicant adhered to the orders of the Court granted earlier in respect of security, having deposited the security as directed.

18. I find the application merited and is hereby allowed.

19. Consequently, an order for stay of execution of the judgment delivered on March 16, 2023, in this matter is hereby granted pending hearing and determination of the appeal.

20. The costs of this application shall abide the appeal.

21. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 27TH DAY OF JULY, 2023.

C. N. BAARI

JUDGE

Appearance:

N/A for the Applicant/Appellant

N/A for the Respondent



